

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

**2006 Term
March Session**

No. 04-E-251

2005-0753

**EDWARD J. BURKE
Plaintiff-Appellant**

v.

**BUNNY'S SUPERETTE, INC.,
THOMAS M. BURKE, MARIE I. BURKE,
AND BERNADINE P. DONELSON
Defendants-Appellees**

Appeal Pursuant to Supreme Court Rule 7

BRIEF FOR THE APPELLANT

Vincent A. Weners, Jr., Esq.
Attorney for the Plaintiff-Appellant
84 Bay Street
Manchester, NH 03104
(603) 669-3970

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TEXT OF RELEVANT STATUTORY PROVISIONS

STATUTORY PROVISIONS

RSA § 491:7 (2005): Jurisdiction

The superior court shall take cognizance of civil actions and pleas, real, personal and mixed, according to the course of the common law, except such actions as are required to be brought in the district courts under RSA 502-A or the probate courts under RSA 547; of writs of mandamus and quo warranto and of proceedings in relation thereto; of actions for support of children of unwed parents; of petition and appeals relating to highways and property taken therefore and for other public use; of actions commenced in the probate or district courts where a right to jury trial is guaranteed by the constitution; of actions commenced in a district court which are transferable by statute to the superior court; of suits in equity under RSA 498:1; of petitions of divorce, nullity of marriage, alimony, custody of children and allowance to wife from husband's property for support of herself and children; of petitions for new trials; of petitions for the redemption and foreclosure of mortgages; of all other proceedings and matters to be entered in, or heard at, said court by special provisions of law; and of all other proceedings and matters cognizable therein for which other special provision is not made.

RSA § 498:1 (2005): Jurisdiction

The superior court shall have the powers of a court of equity in the following cases: Charitable uses; trusts other than express trusts as that term is defined in RSA 564-A:1; fraud, accident and mistake; the affairs of partners, joint tenants or owners and tenants in common; the redemption and foreclosure of mortgages; contribution; waste and nuisance; the specific performance of contracts; discovery; cases in which there is not a plain, adequate and complete remedy at law; and in all other cases cognizable in a court of equity, except that the court of probate shall have exclusive jurisdiction over equitable matters arising under its subject matter jurisdiction authority in RSA 547, RSA 547-C and RSA 552:7.

RSA § 547:1 (2005): Court of Record

The court of probate is a court of record for all purposes.

RSA § 547:3(I)(a)(b)(c) (2005): Jurisdiction

I. The probate court shall have exclusive jurisdiction over the following:

(a) The probate of wills.

(b) the granting of administration and all matters and things of probate jurisdiction relating to the composition, administration, sale, settlement, and final distribution of estates of deceased persons, including the assignment of homestead

and claims against the executor or administrator for those services related to the prior care and maintenance of the decedent and the administration of insolvent estates and appeals therefrom.

(c) the interpretation and construction of wills and the interpretation, construction, modification, and termination of trusts as that term is defined in RSA 564-A:1, I.

RSA § 564-A (I) (2005): Definitions

As used in this chapter:

I: "Trust" means an express trust created by a trust instrument, including a will, whereby a trustee has the duty to administer a trust asset for the benefit of a named or otherwise described income or principal beneficiary, or both; "trust" does not include a resulting or constructive trust, a business trust which provides for certificates to be issued to the beneficiary, an investment trust, a voting trust, a security instrument, a trust created by the judgment or decree of a court, a liquidation trust, or a trust for the primary purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, or employee benefits of any kind, an instrument wherein a person is nominee or escrowee for another, a trust created in deposits in any financial institution, or other trust the nature of which does not admit of general trust administration.

QUESTION PRESENTED

- I. Whether the Superior Court has jurisdiction over a claim of fraud, duress, and undue influence in the creation and modification of a revocable inter vivos trust and transfers of property to and from that trust.

STATEMENT OF THE CASE

Edward J. Burke filed a complaint against the defendants, Marie I. Burke, Thomas M. Burke, and Bernadine P. Donelson, and Bunny's Superette, Inc. seeking relief in connection with rights and interests resulting from an oral agreement or understanding that was formed among the family members, that all members would equally own the family business and accumulated property. Edward claimed fraud, duress, and undue influence in the creation of and amendments to an inter vivos trust and transfers of property to the trust by Marie Burke and from the trust to Thomas. The Trial Court ruled that it lacked jurisdiction to deal with Marie's revocable inter vivos trust and, therefore, would decline to deal with Edward's allegations of fraud, duress and undue influence.

A Motion to Reconsider was filed by Edward on the grounds that the Trial Court was in error in its ruling. The Trial Court denied the Motion and ruled that Marie's trust was an express trust under the jurisdiction of the Probate Court.

Edward then brought a petition in Probate Court as a "protective filing" and filed this appeal to the New Hampshire Supreme Court. Edward's petition in the Probate Court stated that he believed that the Superior Court had jurisdiction of the transfer of property to the trust and that he did not want to waive any rights he might have in Probate Court.

Edward respectfully asks this Court to remand this matter to the Trial Court with instructions to further remand to the Probate Court for trial on the issue of whether or not the creation and modifications of Marie Burke's Revocable Trust and the transfers of property by Marie Burke into and out of the trust were the result of fraud, duress, and/or undue influence and, if so, what the remedy shall be.

STATEMENT OF THE FACTS

Marie Burke (hereinafter Marie) testified that she may have, although she wasn't sure, had a will before January 7, 1999. (Transcript, Day Two (hereinafter called T), p.4, Exhibit (hereinafter called E) 4F). Marie stated that she wasn't sure when the will was drawn, or who drafted the will, saying that she "thought Ruth did (referring to Attorney Ansell)." (T. p.5-6). She also did not know if she signed the quitclaim deed from herself to the trust in 1999. (T. p.8, E. 5F). Marie did not recognize the revocable trust agreement when it was placed in front of her. (T. p.30-32, E. 1F). Marie stated that she didn't know why her attorney, Mr. Lamontagne, referred her to Attorney Ansell, who drafted her will. (T. p.10). Thomas accompanied her to the meeting where she met Ms. Ansell, who drafted her will, at Mr. Lamontagne's office. (T. p.11). Marie did not recall sending a letter to David Dunn (a previous officer of the corporation of Bunny's Superette) requesting that the stock from Bunny's Superette go to Thomas, nor does she remember who wrote it. (T. p.11-12, E. 7F). Marie stated that she had a meeting with Thomas and Bernadine to discuss the gift of the stock to Thomas. (T. p.14). Marie did not remember receiving a preliminary draft of the will and reviewing it with Thomas before signing it. (T. p.20). She did verify, however, that she reviewed all her legal documents with Thomas before signing them, that she relied upon him, upon his advice, and would not sign anything unless he said it was "okay"; that he took care of "everything." (T. p.20, 28, 31). Thomas paid all of Marie's expenses and wrote all of her checks from her account (since 1986, every check for all of Marie's expenses have been paid by Thomas); "he is always there when I need him." (T. p.20-24). Thomas paid the bill to Attorney Ansell for drafting the will and trust. (T. p.21). Marie testified that

Thomas took care of the properties, the tenants, and the expenses through her real estate account. (T. p.28). The purchases of both properties on Liberty Street and Webster Street were handled by Thomas, as well as the sale of the property on Rockland Avenue. (T. p.27, 29, E. 31F, 32F). Marie's estate consisted of real property, stocks, bonds, cash, and the stock of the corporation. (T. p.39) Marie's entire estate was transferred to the trust (E. 1F) which originally favored Tom and Bernadine, was modified (E. 2F, 3F) in ways to exclude Edward and, thereafter, certain of the assets of the trust were transferred (E. 15F) from the trust to Thomas including the real estate on which Bunny's Superette was situated and twenty-five percent (25%) stock interest in Bunny's Superette, Inc. that was owned originally by Marie and then by the trust. Thomas confirmed that he was aware of the deed from Marie Burke's Revocable Trust that conveyed to him the land and building on which Bunny's Market is situated. (T. p.88). He also confirmed that less than two weeks before the deed was executed, Bernadine and the trust gifted him a total of fifty percent (50%) of the stock of the corporation. (T. p.88). Attorney Ansell confirmed this. Marie, as trustee, gave her stock in the company to Tom, and she also deeded the land on which Bunny's Superette was sited to Tom...approximately the same time, or exactly on the same date, Bunny gave her stock to her brother, Tom, as well...so at that point in time, Tom owned seventy-five percent of the stock in Bunny's Superette and also the land on which its sited, land and buildings. (Transcript, Day One, p.11).

When asked if she had revealed her activities to her son, Edward, regarding the drafting of the will, the trust, the amendments to the trust, and the preparation and execution of at least two deeds, Marie stated the she didn't have to disclose this information to Edward. (T. p.13).

SUMMARY OF THE ARGUMENT

To the extent the Plaintiff's appeal challenges the correctness of the ruling of the Trial Court, it is hereby modified as follows:

The Plaintiff is concerned that the Trial Court did not raise the jurisdictional issue prior to trial and opposing counsel did not raise the issue either prior to the Trial Court's order. The evidence set forth in the Statement of Facts was introduced at trial without objection, and no counsel for the Defendants either objected to the introduction of the evidence or raised the jurisdictional issue, and the Trial Court raised the issue of jurisdiction, sua sponte, for the first time, in its decision. Accordingly, the precise parameters of the jurisdiction of the Superior Court and the Probate Court were not litigated.

It is now agreed by the Plaintiff that the Trial Court's decision on jurisdiction is partially correct. The Trial Court has authority to question its own jurisdiction at any time. If the decision had been made prior to trial, however, or the issue raised during trial, the Plaintiff would have had the opportunity to initiate his action in the Probate Court at that time. Instead, the Plaintiff filed his Probate Court action subsequent to the Trial Court's ruling. Both this action and the Probate Court action remain pending.

Accordingly, the Plaintiff requests the Court to remand this matter to the Trial Court with appropriate instructions to further remand the same to the Probate Court for trial on the issue of whether or not the creation and modifications of the Marie Burke Revocable Trust and the transfers of property to the trust by Marie Burke and from the trust to Thomas Burke were the result of fraud, duress, and/or undue influence.

ARGUMENT

I. Introduction

The Trial Court, in its Order dated August 23, 2005, ruled:

"In addition, Edward accuses Thomas of wrongdoing as to the 2004 conveyances, and of exerting undue improper influence over Marie. The Court first observes that it lacks jurisdiction to directly deal with trusts such as Marie's revocable trust, and with wills. See RSA 547:3 I. (a) and (c)(Supp. 2004); RSA 498:1 (1997 & Supp. 2004). The Court thus declines to directly deal with Edward's challenges to Marie's trust and will-related actions, including his contentions that Thomas has wrongfully acted in connection therewith, or has exerted undue influence."

Thereafter, the Plaintiff filed a Motion to Reconsider alleging that the Trial Court was in error with respect to its ruling and the Trial Court, on September 26, 2005, ruled:

"In so doing, the Court first observes that the trust of Marie I. Burke is plainly an "express trust" within the meaning of RSA § 564-A:1, I. Second, the Probate Court has "exclusive jurisdiction over equitable matters arising under its subject matter jurisdiction authority in RSA § 547..."RSA § 498:1; See also RSA 547:3-b, and RSA 547:3, I (a), (c), and (d). The petitioner misstates the law when he asserts that "the law in New Hampshire is settled that the Superior Court has jurisdiction of inter vivos transfers and trusts until the transferor dies." See Pl.'s Response to Resp., Thomas M. Burke's Supplemental Objection to Plaintiff's Motion to Set Aside, Modify, and/or Reconsider Decree, dated September 21, 2005 at 1. Third, the Superior Court subject matter jurisdiction restraints require that this Court not pass on those issues that directly pertain to the trust of Marie I. Burke. The Court clarifies that it makes no rulings as to, for example, the petitioner's challenge to the transfer of stock (through the trust) to Thomas M. Burke from Marie I. Burke as trustee, or as to his challenge to the deeding through the trust to Thomas M. Burke of certain real property associated with Bunny's Superette.¹ Fourth, the parties' failure to raise the subject matter jurisdiction limitation of this Court during the trial does not somehow provide this Court with proper subject matter jurisdiction. Finally, any party here remains able to initiate appropriate proceedings in the Probate Court as to matters or issues within that Court's subject matter jurisdiction."

¹ The Court notes that its findings relative to Marie I. Burke's will and trust, as set forth on pages 9-10 of its Order dated August 23, 2005, do no more than track the undisputed chronology of the will/trust executions Marie I. Burke entered. Further, the Court withdraws the finding that "Thomas gave no money or other consideration for these conveyances either to Marie (or her trust) or Bernadine." This specific finding goes beyond the Court's subject matter jurisdiction insofar as it directly deals with Marie I. Burke's trust-related actions, and is unnecessary in connection with the Court's treatment of Bernadine P. Donelson's stock conveyance.

Thereafter, the Plaintiff filed his Notice of Appeal on October 20, 2005, stating the issue as follows:

"Whether or not the Superior Court has jurisdiction to hear Edward J. Burke's claims related to the fraud, duress, and/or undue influence of Thomas M. Burke in the creation of and amendments to Marie I. Burke's revocable, inter vivos, "pour over" trust, deeds of real estate to the trust, transfers of other property to the trust, and a deed from the trust of the land and buildings on which Bunny's Superette, Inc. is situated to Thomas Burke pursuant to RSA 498:1.

The Trial Court ruled it had no jurisdiction pursuant to RSA 547:3, I(a) and (c) to deal with "trusts such as Marie's revocable trust, and with wills."

The Appellant claims that the Superior Court has jurisdiction over trusts other than "express trusts" as that term is defined in RSA 564-A:1 (i.e. inter vivos "pour over" trusts) and that the Probate court has no such jurisdiction unless an interested party files a motion to invoke the same pursuant to RSA 564-B:2-201. Marie Burke's trust is not an express trust subject to the exclusive jurisdiction of the Probate Court. It has nothing to do with the administration of the estate of a deceased person and, read together with her will, is intended to be a "pour over" trust specifically designed not to be "subject to the administration or jurisdiction of the Probate Court." See RSA 563-A:1 and II; and Wills, Trusts, and Gifts, DeGrandpre (1997), section 27-2."

After the decision of the Trial Court, the Plaintiff brought the petition in Probate Court as a "protective filing." The petition stated that the Superior Court ruled that it did not have jurisdiction to rule on the Plaintiff's claims related to fraud, duress, and/or undue influence of Thomas M. Burke in the creation of and amendments to Marie I. Burke's revocable, inter vivos, "pour over" trust, deeds of real estate to the trust, transfers of other property to the trust, and a deed from the trust of the land and buildings on which Bunny's Superette is situated and transfer of stock in Bunny's Superette, Inc., from the trust to Thomas. While the Trial Court ruled that the Probate Court has exclusive jurisdiction over this matter, the Plaintiff believes that the Superior Court has jurisdiction because of the bifurcated issues of the creation and modifications of the trust (conceded

to be within the jurisdiction of the Probate Court) and transfers of Marie's entire estate to the trust, and subsequent transfers of both real property (the land and buildings on which Bunny's Superette was situated) and personal property (the stock in Bunny's Superette, Inc.) to Thomas Burke (arguably within the jurisdiction on the Superior Court).

Upon reconsideration in the preparation of this Brief, however, the Plaintiff has concluded that the Trial Court's ruling was substantially correct, and not in error, but that the subject matter jurisdiction, nevertheless, is not totally resolved by the Trial Court's ruling. Specifically, it is conceded that the Trial Court did not have jurisdiction over the interpretation, construction, modification, and termination of the Marie Burke Revocable Trust but it is not clear whether or not it retained jurisdiction over the transfers of property to the trust by Marie Burke, and from the trust to Thomas Burke, which transfers are alleged to have been the result of fraud, duress and undue influence.

II. The Current Statutes Regarding Jurisdiction

In the Order dated August 23, 2005, the Superior Court ruled that:

"In addition, Edward accuses Thomas of wrongdoing as to the 2004 conveyances, and of exerting undue improper influence over Marie. The Court first observes that it lacks jurisdiction to directly deal with trusts such as Marie's revocable trust, and with wills subject to RSA 547:3 I. (a) and (c)(Supp. 2004); RSA 498:1 (1997 & Supp. 2004). The Court thus declines to directly deal with Edward's challenges to Marie's trust and will-related actions, including his contentions that Thomas has wrongfully acted in connection therewith, or has exerted undue influence."²

The Superior Court is a court of general jurisdiction that does not hear cases involving issues subject to the grant by the General Court of jurisdiction to the Probate Court.

² The conveyances to which the court refers includes transfers of real property, various stocks and bonds, cash, and the stock of the Bunny's Superette Corporation. See the Statement of Facts.

"The Superior Court shall take cognizance of civil actions and pleas, real, personal and mixed, according to the course of the common law, except such actions as are required to be brought in the district courts under RSA § 502-A (Criminal Cases-District Courts) or the probate courts under RSA § 547." RSA § 491:7.

The Probate Court is a court of such exclusive jurisdiction as may, by legislation, be granted to it by the General Court.³

"The Probate Court shall have exclusive jurisdiction over the following: (a) the probate of wills, (b) the granting of administration and all matters and things of probate jurisdiction relating to the composition, administration, sale, settlement, and final distribution of estates of deceased persons....and (c) the interpretation and construction of wills and the interpretation, construction, modification, and termination of trusts as that term is defined in RSA § 564-A:1(I) (Definition of "trust.")" RSA § 547:3(I)(a)-(I)(c); Charles DeGrandpre, *Probate Law and Procedure* § 5-10 (Michie).

RSA § 547:1 provides that the Probate Court is a court of record for all purposes.

Therefore, a judgment of a court of probate upon any matter within its jurisdiction is final and conclusive to the same extent as a judgment of a court of common law. *Tebbets v. Tilton*, 24 N.H. 120 (1851).

Additionally, RSA § 547:3-b has granted the Probate Courts powers of equity in cases in which there is not a plain, adequate, and complete remedy at law involving partition, guardianships, conservatorships, and the probate of an estate and in all other cases cognizable in a Court of Equity arising under RSA Chapter 547 (Judges of Probate and Their Jurisdiction).

III. Jurisdiction Over Trusts

An inter vivos trust is an express trust over which the Probate Court has jurisdiction.

³ Although this seems somewhat counterintuitive and contradictory, not only to the combined application of many years of usage under the prior version of the statute, but also to the language of the Uniform Trust Code, RSA § 564-B:2-201 (2005), which reads (a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.

"Trust means an express trust created by a trust instrument, including a will, whereby a trustee has the duty to administer a trust asset for the benefit of a name or otherwise described income or principal beneficiary, or both; "trust" does not include a resulting or constructive trust, a business trust which provides for certificates to be issued to the beneficiary, an investment trust, a voting trust, a security instrument, a trust created by the judgment or decree of a court, a liquidation trust, or a trust for the primary purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, or employee benefits of any kind, an instrument wherein a person is nominee or escrowee for another, a trust created in deposits in any financial institution, or other trust the nature of which does not admit of general trust administration." RSA § 564-A:1 (I); DeGrandpre, *Probate Laws* at § 5-10.

With the expansion of Probate Court jurisdiction in 1993, the grant of jurisdiction to the Superior Court, RSA § 498:1, was amended to remove its jurisdiction over express or inter vivos trusts. Matthew Bender & Company, Inc., *Wills, Trust and Gifts* § 27.01(2) (LexisNexis Group). Inter vivos trusts now come under the jurisdiction of the Probate Court. *Id.* at § 27.02. Indeed, RSA § 547:3(III) specifically states that nothing in that section shall be construed to confer upon the probate court any additional authority over inter vivos trusts beyond that authority exercised by the Superior Court prior to the adoption of this section of the New Hampshire Revised Statutes Annotated. See DeGrandpre, *Probate Laws* at § 5-10.

IV. Jurisdiction Over Property

The Superior Court has jurisdiction to hear all cases involving any interest in real or personal property. RSA § 491:7. In *Seidel*, *infra*, because no other provision was made by statute, this Court held that the Superior Court had jurisdiction to resolve disputes between persons claiming an interest in real property, and determined that the Trial Court erred when it declined to exercise jurisdiction to determine whether maintaining a dock was a reasonable use of an easement. *Gray v. Seidel*, 726 A.2d 1283 (1999). Similarly, in *In re Estate of O'Dwyer*, *infra*, this court held that a specific grant

of jurisdiction to determine title to real estate was absent from the powers conferred upon the Probate Court under statute; instead, this Court held that the legislature granted such jurisdiction to the Superior Court. *In re Estate of O'Dwyer*, 605 A.2d 216 (1992). For an example of the Probate Court exercising its core jurisdiction over the estate of a decedent as well as deciding the related issues of competing claims to personal property between the estate and another person, see *In Re Petition to Enlarge the Estate of Roy L. McIntosh*, 146 N.H. 474 (2001). This Court could have, but did not, hold that disputes over the transfers of personal property outside the estate (or, as in the case at bar, outside the trust) were within the exclusive jurisdiction of the Superior Court.

V. Conclusion

The Trial Court was correct in ruling that it did not have the jurisdiction to hear the Plaintiff's arguments regarding Marie Burke's Revocable Inter Vivos Trust and those matters were within the jurisdiction of the Probate Court. The jurisdictional mandate of RSA § 564-A:1(I) grants exclusive jurisdiction over inter vivos trusts to the Probate Court, by its definition of an express trust and the listed, specific exclusions of certain express trusts. Furthermore, RSA § 547:3(I) confers exclusive jurisdiction over the interpretation, construction, modification and termination of trusts, as trusts are defined by RSA § 564-A:1(I). Marie Burke's revocable trust is an express trust. The analysis of DeGrandpre in *Probate Law and Procedure*, section 5-10, supports this finding.

The conveyance of property to Marie Burke's revocable inter vivos trust, however, arguably continues to be subject to the jurisdiction of the Superior Court. The predicate of the Probate Court's jurisdiction is the "interpretation, construction, modification, and termination" of trusts pursuant to RSA § 564-A:1(I). However, the

Trial Court held that the Plaintiff not only alleged fraud and undue influence in the creation and modification of Marie Burke's revocable inter vivos trust, but also in the transfers of property to the trust. Furthermore, RSA § 491:7 grants jurisdiction to the Superior Court of "civil actions and pleas, real, personal and mixed..." This Court further held in *Seidel* and *In re Estate of O'Dwyer* (as originally stated in *Rockwell v. Dow*, 85 N.H. 58 (1931)) that since the specific grant of jurisdiction regarding real property was not specifically mentioned in the grant of powers to the Probate Court (a court of exclusive jurisdiction whose power comes through an express grant of power by statute) or not specifically omitted from the grant of powers to the Superior Court, a court of general jurisdiction, that the jurisdiction would naturally fall upon that of the Superior Court. In summary, it may be argued that the Trial Court retains exclusive jurisdiction of the transfers of property to and from the trust and that the Probate Court has exclusive jurisdiction over the construction and modification of the trust.

Unfortunately, the parameters of the jurisdictional elements of this case were not initially litigated. The Plaintiff is concerned that the Trial Court did not raise the jurisdictional issue prior to or during the trial and that opposing counsel did not raise the issue prior to or during the trial. Additionally, the evidence set forth in the Statement of Facts was introduced at trial without objection, heard by the Trial Court, and counsel for the Defendants neither objected to the introduction of the evidence nor raised the jurisdictional issue. The Trial Court raised the issue of jurisdiction, sua sponte, for the first time, in its decision. Accordingly, the precise parameters of the jurisdiction of the Superior Courts and the Probate Courts, with regard to jurisdiction as to the issue of this case, were not litigated.

The extent to which the Plaintiff's appeal challenges the correctness of the ruling of the Trial Court is hereby modified. The Plaintiff agrees that the Trial Court's decision on jurisdiction is partially correct. Certainly, the Trial Court has authority to question its own jurisdiction at any time. If, however, the decision had been made either prior to the trial or if the issue had been raised during the course of the trial, the Plaintiff would have had the opportunity to initiate his action in the Probate Court at that time. Instead, the Plaintiff filed his Probate Court action subsequent to the Trial Court's ruling. As a result, both this action and the Probate Court action remain pending.

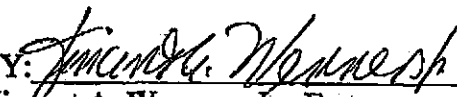
A literal interpretation of the statutes may require a remand to the Superior Court for trial regarding the validity of the property transfers, and to the Probate Court for trial regarding the validity of the creation and modification of the trust. The facts, circumstances, evidence, and documents related to the issues, however, are nearly identical and it would not serve judicial economy to remand for bifurcated hearings. The most efficient and practical approach, as the Trial Court suggested in its ruling on the Plaintiff's Motion to Reconsider, and as the Probate Court demonstrated in *In Re McIntosh*, supra, would be to remand this case to the Trial Court with instructions to further remand for trial in the Probate Court on the petition now pending.

Accordingly, the Plaintiff requests the Court to remand this matter to the Trial Court with instructions to further remand to the Probate Court for trial on the issue of whether or not the creation and modifications of the Marie Burke revocable trust and the transfers of property by Marie Burke to the trust and from the trust to Thomas Burke, were the result of fraud, duress, and/or undue influence and, if so, what the remedy shall be.

CONCLUSION

For the foregoing reasons, Edward J. Burke wishes to be granted fifteen (15) minutes to present oral argument. Vincent A. Weners, Jr., Esq., will argue on behalf of Mr. Burke.

Respectfully submitted,
Edward J. Burke
13 Meadowcrest Road
Hooksett, NH 03106


BY: 

Vincent A. Weners, Jr., Esq.
Attorney for the Plaintiff-Appellant
84 Bay Street
Manchester, NH 03104
(603) 669-3970

Dated: March 20, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this date one copy of the foregoing written Brief of Edward J. Burke was forwarded by first class mail, postage pre-paid, to James A. Normand, Esq., Ovide M. LaMontagne, Esq., Ruth Tolf Ansell, Esq., and Danielle L. Pacik, Esq., this 20th day of March, 2006.



Vincent A. Weners, Jr., Esq.

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
NORTHERN DISTRICT

DOCKET NO. 04-E-251

EDWARD J. BURKE

v.

BUNNY'S SUPERETTE, INC.,
THOMAS M. BURKE, MARIE I. BURKE,
AND BERNADINE P. DONELSON

ORDER

The Petitioner, Edward J. Burke ("Edward"), brings this action against his mother, Marie I. Burke ("Marie"), his two siblings, Thomas M. Burke ("Thomas") and Bernadine P. Donelson ("Bernadine"), and Bunny's Superette, Inc. ("Bunny's"), seeking broad relief in connection with rights and interests he claims under a purported oral agreement. Edward avers that many years ago, when he and his siblings still lived with their parents, a verbal agreement or understanding was reached among all concerned family members that all family members would equally own the family business and other accumulated property. In this regard, Edward asserts that, under this agreement, with the death of the two parents, the siblings would come to equally own said assets. Edward further avers that this original oral agreement or understanding was reaffirmed by the individual respondents upon the death of his father, Bernard Burke ("Bernard"), in

1971, that he fulfilled his obligations under the agreement and fully relied on it, and that the individual respondents have taken actions since about 1999 to wrongfully deprive him of his contract-based rights. In this regard, Edward particularly challenges: (1) Marie's creation of a will and revocable trust in 1999 and her conveyance of certain property into the trust; (2) Marie's later trust-related actions in 2004 to further limit his claimed property entitlements, including her conveyance, through the trust, of both stock in Bunny's and certain real properties to Thomas; and (3) Bernadine's conveyance of her stock in Bunny's to Thomas in 2004 at about the same time her mother conveyed hers through the trust. Edward also asserts that Thomas has been guilty of exerting undue influence over Marie to have her take action against him, that he has violated a claimed "fiduciary duty of a de facto attorney," and that he has violated the Uniform Fraudulent Transfer Act, RSA Chapter 545-A. Finally, he claims that Thomas is proceeding, or has proceeded, particularly through corporate special meetings relative to Bunny's, in ways which are contrary to, and violative of, his contract-based rights.

The individual respondents vigorously oppose Edward's contentions. They assert that no oral agreement, as suggested by Edward, was ever in place, and they contend, among other things, that they have acted properly and within their rights relative to pertinent inheritance and property interests herein.

The Respondent, Bunny's, also opposes Edward's case, and has also interposed a counterclaim, contending that Edward has failed to repay certain indebtedness due the corporation.

A trial occurred over two days -- June 15 and June 16, 2005. During the trial, the Court received testimony from several witnesses, either live or through videotaped deposition, and also received a number of exhibits into evidence. The Court, thereafter, was also provided post-trial memoranda.

Upon consideration of the pertinent evidence, and the arguments presented, the Court finds and rules as follows.

I Background

Bernard, with his wife Marie, established a food business in the early 1950's. The principal food market, known as Bunny's Superette, came to be located on Webster Street, Manchester, New Hampshire. When the food business began, the three children, Bernadine, Edward and Thomas were, respectively, about 12, 10 and 6 years of age. The business was unquestionably considered a family business, and the Burke siblings worked in it throughout their childhood without pay. Nonetheless, their parents retained full control (legal and otherwise) of the business. They made all pertinent decisions, and retained full control of business finances and operations. The children were provided with all necessities and were given spending money and use of the family vehicle or vehicles. They had friends, engaged in sports and extracurricular activities, and were encouraged by their parents to go to college after high school.

After graduation from high school, all of the siblings continued, at least for a time, to work in the family food business, either part time or full time. However, only Edward continued without interruption to work in the business.

Both Bernadine and Thomas attended college, and received financial support from their parents. Bernadine went on to, among other things, teach for several years, and to marry. She did not return to work at the family food store except on a sporadic basis. Thomas, for his part, went into the military after college where he served for several years. He came to return to work in New Hampshire in the late 1960's, and came to return to work in the family food business. When he did this, he received from his parents a salary for his work.

As stated previously, Edward remained in the family business and did not go to college. He continued to work particularly with his father and continued to work for a time with no salary. During this period, however, his parents paid for his living expenses, provided him spending money, and gave him use of the family vehicle or vehicles. Moreover, when the Petitioner married in about 1966, he moved out of his parents' home and came to receive a salary for his work efforts.

There is no question that Edward worked hard and constructively in the family business. He was deeply attached to his father. Indeed, at trial he testified that the time working with his father were "the best years of his life." Certainly, as well, Edward considered himself to be an important contributor to the family business. Nevertheless, and whatever his subjective views were in this regard, Edward has here failed to show that any contract or understanding agreed to by all concerned (including his mother) was ever entered into so that he and his siblings were afforded some enforceable form of ownership interest in the family business and in the other properties owned by their parents. To the

contrary, the evidence shows that Bernard retained strong control over the family business and related properties so long as he lived, and particularly worked in partnership with his wife, Marie, in so doing. In this connection, it was Bernard, over some objection from Edward, that determined that Thomas should be allowed to return to the family business in the late 1960's when Thomas left the military.

It is true that Edward came to be very much involved in the business's financial affairs, even while his father was alive, and also played a significant role in business operations, expansion initiatives, and construction activities. It is also true that, as time went on, both Marie and Bernadine became increasingly less involved in actual business operations, and Edward (and also Thomas) took on increasing responsibility. Nonetheless, and particularly in the case of Edward, it has not been shown that he continued to work in the business because of any enforceable promise or guarantee of part ownership. Rather, the Court finds that Edward stayed in the business, worked therein, and dealt as well with other property owned by his parents, because he was attached to the business and to his father, and not because of any real or enforceable agreements or guarantees of ownership.

In or about 1970, Bernard became ill and died on May 12, 1971. He left a will that provided each of his children with only one dollar, and gave the rest of his estate fully to his wife, Marie. See T. Burke Ex. A. In addition, and as the surviving joint tenant, Marie became sole owner of certain real and other properties which had been purchased or obtained during the marriage and which

were still possessed when Bernard died. These included real property in Manchester located at 121 Arah Street, 18 Rockland Avenue, 68 Webster Street, 77 Webster Street, and 753 Pine Street.

Edward never contested or challenged his father's will, although it did not recognize or confirm any purported "equal ownership" agreement. Nor did he take at that time any other action challenging his mother's property interests. Instead, he worked with his mother and siblings, and with the family's trusted lawyer, Charles Dunn, Esq., to create a corporation to operate, in the future, the family business. This corporation, (Bunny's) was established with Marie and the children each having a 25% ownership interest. However, in connection with other remaining properties, Marie retained full ownership.

Edward asserts that at or about this time the family members all reaffirmed the prior "equal ownership" agreement. He points to the "equal ownership" status set up as to the corporation, and avers that the real property and other property that his mother inherited were kept in his mother's name only for tax and income reasons. The Court finds otherwise.

The Court finds that in allowing the establishment of a corporation for the family business, Marie agreed to provide, or allow, a 25% ownership interest to each of her children and to retain that same percentage interest for herself. She did this not because of any prior agreement or understanding as to "equal ownership", but principally because at that time, and with her husband's death, this action recognized her children's contributions to the business, and, most significantly, effectively worked to keep her sons fully involved in the business.

The ownership arrangement appears to have been first suggested to Marie by Bernadine. At the same time, Marie retained full ownership of all other properties.

As part of the incorporation process, Edward, along with his mother and two siblings, entered into a stock restriction agreement which provides:

In the event that any stockholder during his lifetime desires to sell any of his stock, he shall first offer it or such part of it as he wishes to sell, to the corporation at the "agreed price" . . . and the corporation shall have sixty (60) days to accept or reject the offer. If the corporation rejects the offer, the offer shall be repeated to the other stockholders in proportion to their holders [sic] and the said stockholders shall have sixty (60) days to accept or reject the offer. If the other stockholders reject the offer, then the holder shall be free to sell said stock to any other party, which party shall take subject to this restriction.

See Exhibit B to the Petition for Injunction.

The above-cited stock restriction is the only one that was put in place to limit a shareholder's right to transfer stock holdings. No stock restriction agreement was put in place to prohibit or hinder a shareholder from gifting his/her stock interests.

After the business's incorporation, Edward and Thomas operated and managed Bunny's for many years, indeed until early 1996. The two brothers worked to expand operations, and purchased and/or owned stores outside of Manchester. Edward and Thomas set their salaries, and each took the same salary. The profitability of their business operations fluctuated: some years (e.g. between 1980 to 1985) the business was quite successful, and the brothers each earned incomes in the \$60,000 to \$80,000 range. In other years, however, (e.g. 1993 to 1995) their business operations did less well and each, as a

consequence, earned less income (i.e. in the \$30,000 to \$40,000 range). See T. Burke Ex. B.

In the meantime, the brothers, (and increasingly Thomas by himself over time) managed their mother's real estate and other holdings. Rental and other income, or revenues attributable to said holdings (or their sale), were maintained in accounts for her; her needs were covered or provided for through said accounts; and she even received in some years a salary from the business -- as did Bernadine. Nonetheless, Marie maintained complete ownership of her properties and never agreed (until recently) to part with any such ownership. Indeed, with the sale of certain real properties in 1987, that is, those located at 100 Webster Street and 18 Rockland Avenue, she retained all sale proceeds even though Edward requested at that time that he be given a portion of the proceeds.

Over the years, Edward's relationship with his mother and his siblings worsened. In February, 1996, he abruptly left his actual work situation at Bunny's and went to work at another family/grocery business in Manchester, Jon O's Market, Inc., a business involving one of his sons. Edward claims that he left his work at Bunny's because he caught Thomas stealing some cash proceeds. The evidence suggests, however, that the problems between the brothers were of a broader nature, and, to some degree, involved Edward's increased involvement, prior to his departure, with the Jon O's Market, Inc. business.

At the time he ceased working at Bunny's, Edward owed the Company monies because of past shareholder loans. Although he has made some

payments in that regard, Edward continued to owe, with accrued interest, the sum of \$35,207.87 as of about the time the Company asserted its counterclaim herein. To be sure, in some past years the brothers were able to fully cover loans they had taken by later bonuses. This, however, was not always possible, and Edward's outstanding indebtedness was not subject to such bonus coverage.

From early 1996 onward, Edward, his wife, his children, and his grandchildren had almost no contact with Marie or Thomas or Bernadine. Indeed, Marie has never met Edward's grandchildren and has not had any real contact with his children since they were very young.

In 1999, Marie created a will and revocable trust, to provide for the distribution of her estate at her death. In these documents, she did not treat her children equally. Her stock in Bunny's and her property interests in related business real estate were slated to go to Thomas upon her death. See Pl.'s Exs. 1 and 4.

In March, 2004, Marie, in her capacity as trustee of the Marie I. Burke Revocable Trust, conveyed certain real properties associated with Bunny's to Thomas. See T. Burke Ex. G; Pl.'s Ex. 6. Said properties, and her stock in Bunny's, had earlier been transferred to the Trust. Then, in April, 2004, Marie, again through her trust, and Bernadine, individually, both conveyed their entire stock interests in Bunny's to Thomas. See e.g. Pl.'s Exs. 7 and 20.

Thomas gave no money or other consideration for these conveyances either to Marie (or her Trust) or Bernadine. At about the time the conveyances

were effectuated, Marie amended her trust, changing the dispositions for her children and others. Among other things, Marie amended the Trust to change her disposition, upon her death, to Edward. See Pl.'s Ex. 2.

After Edward instituted this present action, Marie made further amendments to her trust documents to eliminate any disposition to Edward. See Pl.'s Ex. 30. She then later further amended the trust in September 2004 to create a residuary trust for Bernadine. See Pl.'s Ex. 3.

Once he obtained from his mother and Bernadine their stock in Bunny's, Thomas took actions to change the composition of Bunny's Board of Directors and otherwise consolidate his control over the business.

II. Discussion

In order to establish an oral agreement or understanding of the nature suggested by the Petitioner, he is required to establish its existence by clear and convincing evidence. See Tsiatsios v. Tsiatsios, 140 N. H. 173, 176 (1995); Shaka v. Shaka, 120 N. H. 780, 782 (1982). This he has failed to do. Rather, the evidence supports the conclusion that no such "equal ownership" agreement was ever reached. Moreover, while Edward worked many good years in the family business, he obtained substantial benefits for his efforts.

Edward, however, also argues that the transfers of Bunny's stock that Marie (through her trust) and Bernadine, individually, made to Thomas in the spring of 2004 were not gifts but "sales" within the meaning of the pertinent stock restriction agreement. In addition, Edward accuses Thomas of wrongdoing as to the 2004 conveyances, and of exerting undue improper influence over Marie.

The Court first observes that it lacks jurisdiction to directly deal with trusts such as Marie's revocable trust, and with wills. See RSA 547:3 I. (a) and (c) (Supp. 2004); RSA 498:1 (1997 & Supp.2004). The Court thus declines to directly deal with Edward's challenges to Marie's trust and will-related actions, including his contentions that Thomas has wrongfully acted in connection therewith, or has exerted undue influence.

However, and insofar as the Court has jurisdiction herein, it finds and rules that no conveyances of Bunny's stock in April, 2004 have here been shown to have been a form of "sale" under the stock restriction agreement. As to Bernadine's stock conveyance at that time, it has not been established that it involved any consideration provided by, or created by, Thomas. The Court finds that while Bernadine determined to make the stock conveyance after she discussed the matter with both Marie and Thomas, she did so not because she received anything of value from Thomas, but because she felt it best for all concerned. Bernadine trusts and believes in both Marie and Thomas - - who both have long-standing and good relations with her. While Marie did make revocable provisions for Bernadine in her trust, the Court does not find that these somehow constitute consideration from Thomas for Bernadine's conveyance of her stock to him.

Nor does the Court find in this case any basis to provide Edward any relief in connection with special meetings or corporate action that Thomas has recently initiated or taken after he obtained the stock conveyances.

Accordingly, the Court finds and rules that Edward has failed to establish entitlement to any of the relief he seeks.

Turning now to Bunny's counterclaim, the Court finds and rules that Edward owes Bunny's the sum of \$35,207.87 to the date the counterclaim was instituted. See in particular Bunny's Ex. K. Contrary to Edward's contentions, the Court finds that there was no proper ability, by virtue of corporate earnings in the last fiscal year Edward actually worked at Bunny's, to reduce Edward's debt through bonuses, and that "loans to stockholders" were not repaid each year.

In sum, the Court rules in favor of the Respondents in connection with Edward's claims for relief insofar as these are properly presented, and otherwise dismisses said claims for lack of jurisdiction. With respect to the counterclaim of Bunny's, the Court enters judgment in favor of said Corporation, and as against Edward, in the amount of \$35,207.87.


The parties have advanced claims for attorney's fees in this matter. The Court declines to award any attorney's fees herein. In connection with the Respondents' assertions that Edward has here acted in bad faith, the Court makes no such finding.

Certain parties have filed requests for findings of fact and rulings of law. Insofar as any such proposed findings and rulings are consistent with this Order they are **GRANTED**; otherwise they are **DENIED**.

SO ORDERED.

Date

8/23/05


JOHN M. LEWIS,
Presiding Justice

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
NORTHERN DISTRICT

DOCKET NO. 04-E-251

EDWARD J. BURKE

v.

BUNNY'S SUPERETTE, INC.,
THOMAS M. BURKE, MARIE I. BURKE,
AND BERNADINE P. DONELSON

ORDER

The petitioner, Edward J. Burke, has filed a Motion to Set Aside, Modify and/or Reconsider Decree dated August 23, 2005. Upon consideration, the Court **DENIES** the petitioner's motion.


In so doing, the Court first observes that the trust of Marie I. Burke is plainly an "express trust" within the meaning of RSA 564-A:1. Second, the Probate Court has "exclusive jurisdiction over equitable matters arising under its subject matter jurisdiction authority in RSA 547" RSA 498:1; See also RSA 547:3-b, and RSA 547:3, I (a), (c) and (d). The petitioner misstates the law when he asserts that "[t]he law in New Hampshire is settled that the Superior Court has jurisdiction of inter vivos transfers and trusts until the transferor dies." See Pl.'s Response to Resp., Thomas M. Burke's Supplemental Objection to Plaintiff's Motion to Set Aside, Modify and/or Reconsider Decree, dated September 21, 2005 at 1.

Third, the Superior Court subject matter jurisdiction restraints require that this Court not pass on those issues that directly pertain to the trust of Marie I. Burke. The Court clarifies that it makes no rulings as to, for example, the petitioner's challenge to the transfer of stock (through the trust) to Thomas M. Burke from Marie I. Burke as trustee, or as to his challenge to the deeding through the trust to Thomas M. Burke of certain real property associated with Bunny's Superette.¹ Fourth, the parties' failure to raise the subject matter jurisdiction limitation of this Court during the trial does not somehow provide this Court with proper subject matter jurisdiction. Finally, any party here remains able to initiate appropriate proceedings in the Probate Court as to matters or issues within that Court's subject matter jurisdiction.

SO ORDERED.

Date

9/28/05


JOHN M. LEWIS,
Presiding Justice

¹ The Court notes that its findings relative to Marie I. Burke's will and trust, as set forth on pages 9-10 of its Order dated August 23, 2005, do no more than track the undisputed chronology of the will/trust executions Marie I. Burke entered. Further, the Court withdraws the finding that "Thomas gave no money or other consideration for these conveyances either to Marie (or her trust) or Bernadine." This specific finding goes beyond the Court's subject matter jurisdiction insofar as it directly deals with Marie I. Burke's trust-related actions, and is unnecessary in connection with the Court's treatment of Bernadine P. Donelson's stock conveyance.